ATTORNEY FOR APPELLANT:

MICHAEL B. TROEMEL
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

ARTHUR THADDEUS PERRY
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

RAYNE SHIDELER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0607-CR-400
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald Daniel, Judge
Cause No. 79C01-0411-FC-48

February 13, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Rayne Shideler appeals his aggregate sentence of eighteen years, following a guilty plea, for three counts of burglary, all Class C felonies. Shideler raises the issues of whether the trial court properly sentenced him and whether his sentence is inappropriate given the nature of the offenses and his character. We conclude that Shideler's sentence is inappropriate given the nature of the offenses and his character, and remand with instructions.

Facts and Procedural History

On November 1, 2004, Shideler broke into a commercial building with the intent to steal money from the part of the building occupied by Seal Tight Company. On November 14, 2004, Shideler broke into the same building with the intent to steal money from the part of the building occupied by Seal Tight Company and another part of the building occupied by Gutter Covers. On November 15, 2004, the State charged Shideler with three counts of burglary, all Class C felonies, and three counts of theft, all Class D felonies. On November 16, 2004, the State charged Shideler with four additional counts of burglary, all Class C felonies, five additional counts of theft, all Class D felonies, one count of burglary, a Class D felony, one count of auto theft, a Class D felony, one count of criminal mischief, a Class A misdemeanor, and one count of operating a motor vehicle while never having received a license, a Class C misdemeanor.[1] On April 29, 2005, Shideler pled guilty to three counts of burglary, all Class C felonies. Pursuant to the plea agreement, the trial court retained

discretion in sentencing Shideler, but the executed portion of the sentence was to be capped at twelve years. The State also dropped the remaining sixteen charges pursuant to the plea agreement. On May 27, 2005, the trial court sentenced Shideler to six years on each count, to be served consecutively, for a total of eighteen years with ten years to be served at the Indiana Department of Correction, two years to be served through Tippecanoe County Community Corrections, and six years to be suspended with Shideler placed on probation. In its Sentencing Order, the trial court identified aggravating and mitigating circumstances as follows:

> The Court finds as mitigating factors the defendant has taken responsibility for his actions, the defendant suffers from mental health issues, and the defendant's youthful age.
> The Court finds as aggravating factors the defendant has a history of criminal or delinquent activity, the defendant was on probation at the time of the instant offense, and the defendant is in need of correctional or rehabilitative treatment that can best be provided by his commitment to a penal facility.
> The Court finds the aggravating factors outweigh the mitigating factors.

Appellant's Appendix at 74. At the sentencing hearing, the trial court also stated, "[t]he fact that prior attempts at rehabilitation have failed is an aggravating circumstance and the fact of the defendant's conduct while in the custody of the Sheriff of Tippecanoe County is an aggravating circumstance." Sentencing Transcript at 20. Shideler now appeals his sentences.

Discussion and Decision

I. Standard of Review

Under Indiana Appellate Rule 7(B), "The Court may revise a sentence authorized by

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[1] Theses charges stem from incidents that occurred on November 6, 2004, November 8, 2004, and November 9, 2004.

statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this standard, we have "authorization to revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). "[E]ven where the trial court has been meticulous in following the proper procedure in imposing a sentence, 'we still may exercise our authority under Appellate Rule 7(B) to revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender.'"[2] Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006) (quoting Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005)) (emphasis in original).

II. Appropriateness of Shideler's Sentence[3]

When examining the nature of the offense, we recognize that the advisory sentence[4]

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[2]For this reason, we do not need to address the issue of whether the trial court properly sentenced Shideler.

[3] The fact that Shideler entered into a plea agreement that capped the maximum executed portion of his sentence at twelve years does not mean he has acquiesced to his sentence and may not challenge the appropriateness of his sentence. Childress, 848 N.E.2d at 1079.

[4] Our legislature amended our sentencing statutes to replace "presumptive" sentences with "advisory" sentences, effective April 25, 2005. Weaver v. State, 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), trans. denied. Shideler committed the criminal offenses before this statute took effect, but was sentenced after. Under these circumstances, there is a split on this court as to whether the advisory or presumptive sentencing scheme applies. Compare Settle v. State, 709 N.E.2d 34, 35 (Ind. Ct. App. 1999) (sentencing statute in effect at the time of the offense, rather than at the time of conviction or sentencing, controls) with Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (concluding that change from presumptive sentences to advisory sentences is procedural rather than substantive and therefore application of advisory sentencing scheme is proper when defendant is sentenced after effective date of amendment even though offense was committed before). Our supreme court has not explicitly ruled which sentencing scheme applies in these situations, but a recent decision seems to indicate that the date of sentencing is the critical date. In Prickett v. State, 856 N.E.2d 1203 (Ind. 2006), the defendant committed the crimes and was sentenced prior to the amendment date. In a footnote, our supreme court states that "[w]e apply the version of the statute in effect at the time of Prickett's sentence and thus refer to his 'presumptive' sentence, rather than an 'advisory' sentence." Id. at 1207 n.3 (emphasis added). Because we do not address Shideler's argument that his

"is the starting point the Legislature has selected as an appropriate sentence for the crime committed." Weiss v. State, 848 N.E.2d 1070, 1072 (Ind. 2006). For a Class C felony, the advisory sentence is four years, the minimum sentence is two, and the maximum is eight. Ind. Code § 35-50-2-6(a). Therefore, the six year sentences ordered by the trial court fall halfway between the advisory sentence and the maximum sentence.

We first examine the nature of Shideler's offense. The crime of burglary is accomplished when a person "breaks and enters the building or structure of another person, with intent to commit a felony in it." Ind. Code § 35-43-2-1. The trial court's sentencing report gives no indication, and the State makes no argument that these offenses are any worse than typical burglaries. Our review of the record also gives no indication that Shideler's offenses are anything other than garden-variety burglaries. The felonies Shideler intended to commit when committed the breakings were theft, the lowest class of felony.[5] Also, Shideler apparently entered these buildings when they were not occupied, thereby at least reducing the risk of endangerment to human life. We by no means trivialize Shideler's actions, but merely recognize that nothing in the nature of Shideler's burglaries makes them any worse than a typical burglary, which the legislature has decided generally warrants a sentence of four years.

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sentence is improper, we need not decide whether the advisory or presumptive sentencing scheme applies in this case. See generally, Primmer v. State, 857 N.E.2d 11, 16 (Ind. Ct. App. 2006), trans. denied. We use the term "advisory" throughout the opinion for consistency's sake only, and in no way imply that the advisory sentencing scheme applies to Shideler's situation.

[5] Theft is a Class C felony if the amount involved exceeds $100,000. The aggregate amount of property stolen or damaged by Shideler was apparently $3,790.69, as the trial court ordered him to pay restitution in that amount.

We next examine Shideler's character. The trial court found four aggravating factors relating to Shideler's character. First, Shideler's criminal history, consisting of two juvenile adjudications, a felony conviction for theft, and a misdemeanor conviction for criminal mischief is far from the lengthiest we have seen. However, this history still comments negatively upon Shideler's character, as does the fact that Shideler was on probation at the time he committed the instant offenses. We also recognize, as the trial court did, that past attempts at rehabilitation have been unsuccessful, and that Shideler was involved in nine disciplinary incidents in the three months he was incarcerated while awaiting sentencing. These factors also comment negatively on Shideler's character.

However, Shideler also has clearly accepted responsibility for his actions. Although his guilty plea did result in him receiving the substantial benefit of the State dropping sixteen charges, Shideler also accepted responsibility by cooperating with authorities prior to entering into this agreement by confessing in detail to his actions. He also stated at his sentencing hearing, "I'm not going to sit up here, Your Honor, and pull the wool over your eyes or any other court . . . I know what I did was wrong," sent. tr. at 11, and "I believe I need to be in prison for a while because of my actions." Id. at 12.

More importantly, Shideler has an extensive and documented history of mental illness. Our supreme court has identified four factors that should be considered when considering a defendant's mental illness in conjunction with sentencing: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any

nexus between the disorder or impairment and the commission of the crime." Ankney v. State, 825 N.E.2d 965, 973 (Ind. Ct. App. 2005), trans. denied (citing Archer v. State, 689 N.E.2d 678, 685 (Ind. 1997)). We have previously concluded that a defendant "who is suffering from a severe, longstanding mental illness that has some connection with the crime(s) for which he was convicted and sentenced is entitled to receive considerable mitigation of his sentence." Biehl v. State, 738 N.E.2d 337, 340 (Ind. Ct. App. 2000), trans. denied (remanding with instructions that trial court impose minimum sentence for voluntary manslaughter where defendant had such an illness and no criminal history). On the other hand, where a defendant is "capable of controlling his behavior, did not have significant limitations on his functioning, and failed to identify a nexus between his mental illness and the instant offense," mental illness should not be as significant a factor for sentencing. Scott v. State, 840 N.E.2d 376, 384 (Ind. Ct. App. 2006), trans. denied (finding that defendant's mental illness should have been given little weight). However, the lack of an established nexus between the illness and the commission of the crime does not necessarily mean that the mitigating circumstance cannot be the basis of a modified sentence. See Weeks v. State, 697 N.E.2d 28, 32 (Ind. 1998) (reducing defendant's sentence from maximum to presumptive sentence and concluding "although there is no clear nexus between Weeks's illness and the killing, there is sufficient showing of his erratic behavior to require that his illness be considered in sentencing").

Similarly, although no evidence establishes a clear nexus between Shideler's mental

illness and the commission of the burglaries,[6] evidence indicates that Shideler has a long-standing history of mental illness that affects his ability to control his actions. Shideler has been diagnosed with bi-polar disorder, attention deficit disorder, oppositional defiant disorder, and conduct disorder. It appears that the first of these diagnoses came in January 1999, when Shideler was twelve years old. His psychiatric illness summary indicates that as a result of these illnesses, he has "poor impulse control for example homicidal ideation, destruction of property or stealing." Appellant's Green Appendix at 12. Also, "[a]t times [Shideler] is able to process and think clearly, he is likely not able to do that on a consistent basis." Id.

After due consideration, we conclude that the factors relating to Shideler's character, particularly his history of mental illness, render his sentence inappropriate. We recognize that aggravating factors are present in this case, but, in light of Shideler's character, we conclude that a sentence above the advisory is inappropriate. We therefore remand with instructions that the trial court amend its sentencing order and sentence Shideler to the advisory sentence of four years for each of the burglary convictions, to be served consecutively, with eight years served at the Indiana Department of Correction, two years served through Tippecanoe County Community Corrections at a level to be determined by them, and two years suspended to probation.

Conclusion

We conclude that Shideler's sentence is inappropriate given the nature of the offense

[6] Shideler's testimony at his sentencing hearing indicates that his direct motivation for committing the

and his character. We therefore remand with instructions that the trial court amend its sentencing order in a manner consistent with this opinion.

Reversed and remanded.

BAKER, J., and DARDEN, J., concur.

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burglaries was his addiction to methamphetamines.